

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
In re Scotts EZ Seed Litigation :
:
:
:
:
:
-----X

12-CV-4727 (VB)

**DECLARATION OF SHAWN PATRICK REGAN, ESQ.
IN SUPPORT OF DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Shawn Patrick Regan, Esq., pursuant to 28 U.S.C. § 1746, hereby declares:

1. I am a member of the law firm Hunton & Williams LLP, attorneys for Defendants The Scotts Miracle-Gro Company, The Scotts Company LLC, and Lowe's Home Centers, LLC (collectively, "Defendants").

2. I am a member of the Bar of this Court.

3. I make this Declaration in support of Defendants' Opposition to Plaintiffs' Motion for Class Certification.

4. Attached hereto as Exhibit 1 is a true and correct copy of excerpts from the treatise, JAMES B. BEARD, TURFGRASS: SCIENCE AND CULTURE (Prentice-Hall, Inc. 1973).

5. Attached hereto as Exhibit 2 is a true and correct copy of Scotts' Supplemental Response to Interrogatory Number 1. (*Filed Under Seal*)

6. Attached hereto as Exhibit 3 is a true and correct copy of Scotts' Response to Plaintiffs' Second Set of Interrogatories. (*Filed Under Seal*)

7. Attached hereto as Exhibit 4 is a true and correct copy of Scotts' Fiscal Year 2009 Complaints Tracker, SMG-EZ026302-12. (*Filed Under Seal*)

8. Attached hereto as Exhibit 5 is a true and correct copy of Scotts' 2009 Product Satisfaction Survey Results, September 2009, SMG-015869-81. *(Filed Under Seal)*
9. Attached hereto as Exhibit 6 is a true and correct copy of a Scotts Turf Builder EZ Seed Product Satisfaction, May 2010, SMG-EZ097464-75. *(Filed Under Seal)*
10. Attached hereto as Exhibit 7 is a true and correct copy of Scotts survey of its Gervais, Oregon staff applying EZ Seed, SMG-EZ034181-82. *(Filed Under Seal)*
11. Attached hereto as Exhibit 8 is a true and correct copy of an excel sheet charting Scotts' refunds made for EZ Seed, reason code by year, and reason category by year, SMG-EZ131299. *(Filed Under Seal)*
12. Attached hereto as Exhibit 9 is a true and correct copy of Plaintiff Arcuri's receipt for EZ Seed, PLFS_000140.
13. Attached hereto as Exhibit 10 is a true and correct copy of a refund check issued by Scotts to Gwen Eskinazi for \$45.00, PLFS_000141.
14. Attached hereto as Exhibit 11 is a true and correct copy of EZ Seed's Packaging SMG-EZ0034719. *(Filed Under Seal)*
15. Attached hereto as Exhibit 12 is a true and correct copy of EZ Seed's Packaging, SMG-EZ034720. *(Filed Under Seal)*
16. Attached hereto as Exhibit 13 is a true and correct copy of EZ Seed's Packaging, SMG-EZ017471. *(Filed Under Seal)*
17. Attached hereto as Exhibit 14 is a true and correct copy of EZ Seed's Packaging, SMG-EZ017546-47. *(Filed Under Seal)*
18. Attached hereto as Exhibit 15 is a true and correct copy of the deposition of Named Plaintiff, Michael Arcuri. *(Filed Under Seal)*

19. Attached hereto as Exhibit 16 is a true and correct copy of the deposition of Named Plaintiff David A. Browne. *(Filed Under Seal)*

20. Attached hereto as Exhibit 17 is a true and correct copy of the deposition of Named Plaintiff Gwen Eskinazi. *(Filed Under Seal)*

21. Attached hereto as Exhibit 18 is a true and correct copy of the deposition of Named Plaintiff Stacy Lonardo. *(Filed Under Seal)*

22. Attached hereto as Exhibit 19 is a true and correct copy of the deposition of Named Plaintiff Lance Moore. *(Filed Under Seal)*

23. Attached hereto as Exhibit 20 is a true and correct copy of the deposition of Named Plaintiff Vance Smith. *(Filed Under Seal)*

24. Attached hereto as Exhibit 21 is a true and correct copy of the deposition of Named Plaintiff Nancy Thomas. *(Filed Under Seal)*

25. Attached hereto as Exhibit 22 is a true and correct copy of the deposition of Plaintiffs' proffered expert Colin B. Weir. *(Filed Under Seal)*

26. Attached hereto as Exhibit 23 is a true and correct copy of the March 19, 2014 engagement letter between Plaintiffs and Colin B. Weir, PLFS_000185-87. *(Filed Under Seal)*

27. Attached hereto as Exhibit 24 is a true and correct copy of the National Weather Service Archive of Hurricane Irene Advisories.

28. Attached hereto as Exhibit 25 is a true and correct copy of the National Weather Service's climatological data for April 2012 in Syracuse, New York.

29. Attached hereto as Exhibit 26 is a true and correct copy of the National Weather Service's climatological data for May 2011 in Rochester, New York.

30. Attached hereto as Exhibit 27 is a true and correct copy of the National Weather Service's climatological graphs and summaries for January 2012 and February 2012 in San Francisco, California.

31. Attached hereto as Exhibit 28 is a true and correct copy of Gwen Eskinazi's Response to Scotts' First Request for Admission.

32. Attached hereto as Exhibit 29 is a true and correct copy of U.S. District Judge James R. Spencer's findings of fact and conclusions of law in *The Scotts Co. LLC v. Pennington Seed, Inc.*, Civ. Action No. 3:12-cv-0168 (E.D. Va. Feb. 26, 2014) [hereinafter *Scotts v. Pennington*].

33. Attached hereto as Exhibit 30 is a true and correct copy of a website for Pennington Seed's product One-Step Complete demonstrating Pennington's "80% Thicker" claim, <http://www.penningtonseed.com/products/filters/brand/1-step-complete>, last visited on May 29, 2014.

34. Attached hereto as Exhibit 31 is a true and correct copy of Scotts' 2013 internal testing of EZ Seed's 50% Thicker claim, "Relative Performance of an EZ Seed Bermudagrass and its Ordinary Seed Counterpart under Reduced moisture conditions," SMG-EZ103046-59. (*Filed Under Seal*)

35. Attached hereto as Exhibit 32 is a true and correct copy of Scotts' 2013 internal testing of EZ Seed's 50% Thicker claim, "Relative Performance of an EZ Seed for Tall Fescue Lawns Formulation and its Ordinary Seed Counterpart under Reduced moisture conditions," SMG-EZ103060-71. (*Filed Under Seal*)

36. Attached hereto as Exhibit 33 is a true and correct copy of Scotts' 2013 internal testing of EZ Seed's 50% Thicker claim, "Relative Performance of an EZ Seed Formulation and

its Ordinary Seed Counterpart under Reduced moisture conditions,” SMG-EZ103072–83. (*Filed Under Seal*)

37. Attached hereto as Exhibit 34 is a true and correct copy of excerpts from John Sass’s deposition. (*Filed Under Seal*)

38. Attached hereto as Exhibit 35 is a true and correct copy of excerpts from Eric Nelson’s deposition. (*Filed Under Seal*)

39. Attached hereto as Exhibit 36 is a true and correct copy of excerpts from Lisa Taubler’s deposition. (*Filed Under Seal*)

40. Attached hereto as Exhibit 37 is a true and correct copy of Kenneth Hignight’s study titled “Comparison of 1 Step Complete to EZ Seed for Lift Test,” SMG-EZ131710–2017. (*Filed Under Seal*)

41. Attached hereto as Exhibit 38 is a true and correct copy of Kenneth Hignight’s study titled “Evaluation of Root Development of Two Patch Seed Brands,” SMG-EZ132059–147. (*Filed Under Seal*)

42. Attached hereto as Exhibit 39 is a true and correct copy of Kenneth Hignight’s study titled “Response of Two Mulch Products for Water Retention on a Sandy Loam Soil Applied at Different Rates, Soil Depths and Environmental Conditions,” SMG-EZ132018–58. (*Filed Under Seal*)

43. Attached hereto as Exhibit 40 is a true and correct copy of Scotts’ Responses to Plaintiffs’ First Requests For Admission. (*Filed Under Seal*)

44. Attached hereto as Exhibit 41 is a true and correct copy of Home Depot, U.S.A. Inc.’s Supplemental Response to Plaintiffs’ Requests For Admission. (*Filed Under Seal*)

45. Attached hereto as Exhibit 42 is a true and correct copy of Lowe's Home Centers, LLC's Amended Response to Plaintiffs' Requests For Admission. *(Filed Under Seal)*

46. Attached hereto as Exhibit 43 is a true and correct copy of Wal-Mart's third-party production, WM2014-000464C000184-1212. *(Filed Under Seal)*

47. Attached hereto as Exhibit 44 is a true and correct copy of Scotts' testing of the 50% Thicker claim, EZ Seed Field Trial 1, SMG-EZ021754-57. *(Filed Under Seal)*

48. Attached hereto as Exhibit 45 is a true and correct copy of Scotts' testing of the 50% Thicker claim, EZ Seed Field Trial 2, SMG-EZ021758-61. *(Filed Under Seal)*

49. Attached hereto as Exhibit 46 is a true and correct copy of Scotts' testing of the 50% Thicker claim, EZ Seed Field Trial 3, SMG-EZ021762-72. *(Filed Under Seal)*

50. Attached hereto as Exhibit 47 is a true and correct copy of Scotts' testing of the 50% Thicker claim, EZ Seed Field Trial 4, SMG-EZ021773-77. *(Filed Under Seal)*

51. Attached hereto as Exhibit 48 is a true and correct copy of Scotts' testing of the 50% Thicker claim, EZ Seed Field Trial 5, SMG-EZ021778-81. *(Filed Under Seal)*

52. Attached hereto as Exhibit 49 is a true and correct copy of Scotts' testing of the 50% Thicker claim, EZ Seed Field Trial 6, SMG-EZ021782-86. *(Filed Under Seal)*

53. Attached hereto as Exhibit 50 is a true and correct copy of Scotts' testing of the 50% Thicker claim, EZ Seed Field Trial 7, SMG-EZ021787-90. *(Filed Under Seal)*

54. Attached hereto as Exhibit 51 is a true and correct copy of Scotts' testing of the 50% Thicker claim, EZ Seed Greenhouse Trial 1 (12/28/07), SMG-EZ021791-95. *(Filed Under Seal)*

55. Attached hereto as Exhibit 52 is a true and correct copy of Scotts' testing of the 50% Thicker claim, EZ Seed Greenhouse Trial 2, SMG-EZ021796-800. *(Filed Under Seal)*

56. Attached hereto as Exhibit 53 is a true and correct copy of Scotts' testing of the 50% Thicker claim, EZ Seed Greenhouse Trial 3, SMG-EZ021801-05. (*Filed Under Seal*)

57. Attached hereto as Exhibit 54 is a true and correct copy of *Scotts v. Pennington* Trial Exhibit No. 275, a chart of product application during testing by NexGen and Mr. Hignight.

58. Attached hereto as Exhibit 55 is a true and correct copy of *Scotts v. Pennington* Trial Exhibit No. 327, Mr. Hignight's coding ledger for application of EZ Seed during his testing.

59. Attached hereto as Exhibit 56 is a true and correct copy of *Scotts v. Pennington* Trial Exhibit No. 333, Dr. Hummel's chart of water release.

60. Attached hereto as Exhibit 57 is a true and correct copy of *Scotts v. Pennington* Trial Exhibit No. 281, a photograph demonstrating EZ Seed's expansion when watered.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 30, 2014.

/s/ Shawn Patrick Regan
Shawn Patrick Regan

CERTIFICATE OF SERVICE

I hereby certify that, on May 30, 2014, I served a copy of the foregoing, on all counsel of record at the addresses listed below, by filing same with the Court's CM/ECF system.

/s/Shawn Patrick Regan
Shawn Patrick Regan

TO:

Scott A. Bursor, Esq.
Joseph I. Marchese, Esq.
Neal Deckant
BURSOR & FISHER, P.A.
888 Seventh Avenue
New York, New York 10019
Telephone: (212) 989-9113
Email: scott@bursor.com
jmachese@bursor.com
ndeckant@bursor.com

-and -

Antonio Vozzolo, Esq.
Christopher Marlborough, Esq.
Courtney E. MacCarone, Esq.
FARUQI & FARUQI, LLP
369 Lexington Avenue, 10th Floor
New York, New York 10017
Telephone: (212) 983-9330
Email: avozzolo@faruqilaw.com
cmarlborough@faruqilaw.com
maccarone@faruqilaw.com

Attorneys for Plaintiffs